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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SMITH W. BAGLEY, ET AL., *Petitioners,*

V.

WEBSTER A. COLLINS, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HUBERT HUMPHREY*
JAMES T. WILLIAMS, JR.
BROOKS, PIERCE,
MCLENDON, HUMPHREY
& LEONARD
Post Office Drawer U
Greensboro, NC 27402
(919) 373-8850

Counsel of Record

(Counsel list appears on inside cover)

BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD
Post Office Drawer U
Greensboro, N. C. 27402
Attorneys for Smith W. Bagley

Hubert Humphrey
James T. Williams, Jr.

ADAMS, KLEEMEIER, HAGAN, HANNAH & FOUTS
Post Office Box 3463
Greensboro, N. C. 27402
Attorneys for American Bank & Trust Co. of Pa.

Charles T. Hagan, Jr.
Charles T. Hagan, III

FLEMING, ROBINSON, BRADSHAW & HINSON
2500 First Union Plaza
Charlotte, N. C. 28280
Attorneys for William F. Thomas

Russell M. Robinson, II

ROY G. HALL, JR., ESQ.
108 West Third Street
Winston-Salem, N. C. 27101
Attorney for James R. Gilley

Roy G. Hall, Jr.

HELMS, MULLIS & JOHNSTON
2800 NCNB Plaza
Charlotte, N. C. 28280
Attorneys for The Northwestern Bank

E. Osborne Ayscue, Jr.
W. Donald Carroll, Jr.

KENNEDY, COVINGTON, LOBDELL & HICKMAN
3300 NCNB Plaza
Charlotte, N. C. 28280
Attorneys for Interstate Securities Corp.

Clarence W. Walker
Edgar Love, III

MOORE, EMERSON & NILES
143 West Franklin Street
Chapel Hill, N. C. 27514
Attorneys for Michael W. Riggsbee

Joseph I. Moore, Jr.

MORROW & REAVIS
NCNB Plaza
Winston-Salem, N. C. 27102
Attorneys for Dewey W. Chapple, Jr.

John F. Morrow

NICHOLS, CAFFREY, HILL, EVANS & MURRELL
Post Office Box 989
Greensboro, N. C. 27402
Attorneys for A. M. Pullen & Co.

Charles E. Nichols

WADE & CARMICHAEL
200 South Tryon Street
Charlotte, N. C. 28202
Attorneys for David R. Johnston

J. J. Wade, Jr.

IN THE

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October Term, 1983

No.

SMITH W. BAGLEY, ET AL., PETITIONERS

v.

WEBSTER A. COLLINS, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the panel of the Court of Appeals for the Fourth Circuit hearing the appeal properly applied Rule 23(a) in affirming the District Court's certification of this case as a class action and determining that plaintiffs and their

counsel were proper class representatives.

2. Whether the decisions of the Court of Appeals and the District Court comply with the requisite standards for entry and review of a class order.

PARTIES

Petitioners: Smith W. Bagley, James R. Gilley, David R. Johnston, Michael W. Riggsbee, The Northwestern Bank, Dewey W. Chapple, Jr., American Bank & Trust Co. of Pa., Interstate Securities Corp., William F. Thomas, A. M. Pullen & Co.

Respondents: Webster A. Collins, Herbert R. Morrison, Helen O. Morrison, Individually and as representatives of all other similarly situated shareholders of The Washington Group, Inc. (formerly The Washington Mills Company), and Glen A. Wilkinson, Intervenor.

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The petitioners, defendants in the case below, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 24, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals decided August 24, 1983, which is not reported, appears in the Appendix (pp. 1a-9a). The orders of the District Court entered on September 17, 1982 and October 26, 1981, which were not reported, also appear in the Appendix (pp. 10a-28a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1983. By order dated September 28, 1983, the Court of Appeals denied the timely Petition for Rehearing in Banc. (Appendix p. 32a) This Petition for Certiorari was filed

within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

The application and interpretation of Rule 23(a) of the Federal Rules of Civil Procedure relating to class actions is involved. Rule 23(a) provides:

> (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

STATEMENT OF THE CASE

The issues presented here present important and far-reaching questions as to the permissible limits for the instigation and maintenance of class actions.

Two purported class actions were instituted on July 26, 1978, by the same attorneys, against various defendants having at one time some connection with the Washington Group, Inc. ("WGI"), a North Carolina textile company. In the shareholder class action, principally alleging securities violations under S.E.C. Rule 10(b)(5) in the form of claimed stock manipulation, these class counts in which Collins and others were named plaintiffs, were joined with several non-securities, non-class counts, in which Gilbert, the reorganization trustee for WGI, was the plaintiff. This entire action was entitled Gilbert, et al. v. Bagley, et al. The Gilbert counts, since severed, are not involved in the appeal on the class issues. Accordingly, the shareholder class action, which is the subject

of this petition, will be referred to as Collins v. Bagley.

The other action, Fulk, et al. v. Bagley, et al., asserts counts, principally under the Employee Retirement Income Security Act, both as a class action, in which several employees were plaintiffs, and also as a fiduciary action, in which Fulk, as the plan administrator, is the sole plaintiff, seeking recovery of losses in certain WGI employee benefit plans.*

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* No petition for certiorari is being sought in the Fulk v. Bagley class action for the reasons that (1) space limitations do not permit in this same petition a meaningful discussion of Fulk v. Bagley, which is a separate action with its own facts, and (2) Fulk v. Bagley joined (unnecessarily) a class action brought by several employees with a fiduciary (non-class) action brought by Fulk, both asserting the same claims; thus, even if the class representatives are disqualified and the class portion of Fulk v. Bagley is

Plaintiffs filed motions for class certification on November 24, 1978. Thereafter class discovery, conducted over a period of several months, revealed a startling chain of events regarding the origination of these actions and the adequacy of plaintiffs and their counsel, which became the subject of the class issues. Oral arguments on the class issues and other matters were held on May 31, 1979, before District Judge Robert R.

(footnote continued)

dismissed (as it should have been), Fulk v. Bagley would presumably proceed in some fashion on the fiduciary claims.

The facts in Fulk v. Bagley, to which a slight reference is made in the per curiam opinion below on the consolidated appeal, do, however, show a common pattern with Collins v. Bagley in the instigation of the class action by the attorneys, the total lack of participation and knowledge by the class representatives, and the lack of unconditional commitment for payment of costs of the litigation.

Merhige, Jr., who eventually chose not to rule on the class issues. A rehearing on these issues was held on August 21, 1981, before District Judge Eugene A. Gordon, who ultimately entered an order granting plaintiffs' class motion on October 26, 1981, followed by a so-called class order on September 17, 1982.

Judge Gordon certified the class issues for immediate appellate review, pursuant to 28 U.S.C. §1292(b), finding that "there are substantial grounds for a difference of opinion within the meaning of 28 U.S.C. §1292(b) as to whether the requirements of Fed.R.Civ.P. 23(a)(4) are met." Following the filing by defendants of petitions for discretionary review, and responses thereto, the Fourth Circuit, by order entered on October 29, 1982, granted leave for immediate appeal pursuant to §1292(b); the panel for this action con-

sisted of Judges Chapman, Sprouse, and Haynsworth. Subsequently, when the appeal was argued, the cases were assigned to a different panel (Judges Winter, Hall and Haynsworth). A 3-1/2 page unpublished per curiam opinion was filed on August 24, 1983, and on September 28, 1983, a petition for rehearing was denied by a one-sentence order concurred in by the panel before whom the appeal was argued.

The complaint in Collins v. Bagley, and plaintiffs' subsequent motion for class certification, assert two separate, non-overlapping classes, the "purchaser plaintiff" class and the "tender offer class."* The complaint named plaintiffs

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* The "purchaser plaintiff class" consists of all persons who purchased stock of WGI between the time of the 1972 merger approval, by which WGI was created, and 1977 filing by WGI for corporate reorganization, and incurred a loss. The "tender offer class" consists of all persons who

Morrison (and wife), Gregory and Hicks as the representatives of the "purchaser class". It named the brothers Webster Collins and Douglas Collins, former Washington Mills shareholders and named plaintiffs in the Shaffner suit, as the representatives of the "tender offer" (Shaffner) class. After the filing of plaintiffs' complaint and motion for class certification in which all plaintiffs were represented to be proper class representatives, first Hicks, then Douglas Collins

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(footnote continued)

were old Washington Mills shareholders prior to the merger of Washington Mills and Convenient Systems, Inc., forming WGI, and who declined to tender their stock to WGI at $19 per share offered as part of a court-approved settlement of Shaffner v. Washington Group, Inc., a 1973 Federal court action by the former Washington Mills shareholders attacking the merger. None of the "purchaser plaintiffs" were former Washington Mills shareholders or were involved in the Shaffner suit.

and later Gregory withdrew from the action.

In order to avoid duplication, the relevant facts showing that the class action came about as a result of solicitation by the attorneys, and that the named plaintiffs were inadequate representatives of the class due to their total lack of knowledge and participation and due to their failure to assume responsibility for the costs of the litigation, will be set forth in the Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

Summary of Reasons

1. The decision of the Court of Appeals certifying plaintiffs and their counsel as proper class representaives, alters standards for the origination of class actions and the adequacy of class representation previously held to be

applicable under Rule 23(a)(4) F.R.C.P., and conflicts with the decisions of a number of Federal courts.

2. The distinction between attorney solicitation of class litigation in private, purely economic, cases (entitled "fee-generating" cases by the commentators) and in cases "intended to advance political objectives", announced in Gulf Oil Company v. Bernard, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), requires implementation and concrete application, in order to render such distinction effective, and in order to avoid the erosion of established class action standards which would result in a wholesale influx of private class suits into and through the federal courts.

3. The decisions below do not comply with the requisite standards for review, and the performance of their respective

functions by the District Court and the Court of Appeals, and would be such a departure from "the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision" (Supreme Court Rule 17.1(a)).

A. This Action Was Instigated And Formulated By Attorneys, Who Thereafter Sought And Obtained Persons Willing To Lend Their Names As Plaintiffs.

The undisputed evidence, primarily from the testimony of the plaintiffs and affidavits of plaintiffs' counsel, shows that this action originated entirely with lawyers, who thereafter sought and found persons willing to lend their names as plaintiffs; but who did not participate in the suit and did not have any knowledge of the matters involved or of their duties as class representatives, as will be shown

in B. below; and who did not assume the necessary responsibility for the costs of the ligitation required by class action standards and the professional canons, as will be shown in C. below.

It is undisputed that meetings, telephone calls, correspondence, and other lawyer activity among plaintiffs' attorneys preparing for a class action took place in the period from January to May, 1978, before any of the plaintiffs in these actions came onto the scene or had any thought of asserting a claim of any kind. After the plans for the class action was formulated and well under way, persons were sought out who might be willing to lend their names as plaintiffs.

The first of the plaintiffs to be secured, Gregory, came into the suit as a result of an unprecedented long distance telephone call to him from a passing ac-

quaintance named Wood who asked Gregory to contact a named attorney, and the conferences with the attorneys which followed that call. Wood, who had not called Gregory in 26 years, and had no stock or other interest in WGI, admitted to two different witnesses, according to affidavits in the record, that he had been asked by the attorney to contact Gregory for this purpose. This improper contact in turn resulted in contacts with Morrison, a resident of Florida, who was later made a plaintiff without his even knowing he had been named a plaintiff until months after the suit was started. Collins, a resident of Massachusetts, became a plaintiff solely as a result of letters written to him by plaintiffs' attorneys, out of the blue, in June and July, 1978 stating that the attorneys had already been working on a lawsuit "for three to four

months" and repeatedly pressing Collins to permit his name to be used as a plaintiff.

None of the persons who came to be plaintiffs had, prior to being contacted, even seen, talked to, or communicated with the plaintiffs' attorneys. They were not their regular attorneys, and no contact was ever made between their regular attorneys and these attorneys.

The per curiam opinion of the Fourth Circuit says, inexplicably: "The record reveals that although plaintiffs' attorneys initiated contact with the proposed class representatives, this does not necessarily constitute solicitation." (p. 6a) Then the opinion goes on to say that "these attorneys had represented the shareholder class in the Shaffner litigation, which ultimately was settled pursuant to a consent decree in 1973." That

is totally incorrect as to Morrison, Gregory and Hicks, the sole representatives of the "purchaser class", who were not involved in any way whatsoever with the Shaffner suit and whom the attorneys did not represent.

Indeed, the per curiam opinion starts off erroneously by saying "these actions arose out of a 1973 merger that led to the formation of the Washington Group, Inc. and a subsequent consent decree settling the claims of the minority shareholders who alleged fraudulent inducement of their approval of the merger. Shaffner v. Washington Group, Inc.". (p. 4a) That is not correct. The "purchaser class" claim, which is the main thrust of this entire case, is asserted on behalf of shareholders purchasing WGI stock in the open market in the years after the merger, and

is totally unrelated to the merger or the Shaffner action.*

Even as to shareholders purportedly represented by plaintiffs' attorneys in

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* Further revealing a pervasive lack of understanding of the case, the opinion also incorrectly states that Fulk v. Bagley, No. 82-1942, is the "tender offer class" action. (p. 7a) Fulk v. Bagley is not a shareholder "tender offer class" action; it is an employee benefit plans suit. Perpetuating this same confusion, the opinion goes on in the next paragraph to state that "George Fulk, the chairman of the Washington Group's pension, profit-sharing and stock purchase plan committees, initially contacted counsel to suggest a class suit in behalf of a 'tender offer' class." (p. 8a) Neither Fulk nor the action of Fulk v. Bagley had anything whatsoever to do with the "tender offer class". Nor, contrary to the indication in the opinion, did he have any legitimate role in the origination of the employee class action since he is not a class representative or part of the employee class action, his only role being that of the fiduciary plaintiff.

These and other fundamental mistakes in the short per curiam opinion plainly show that the opinion gave only superficial attention to the issues, and simply misconceived them.

the 1973 Shaffner suit, that suit was totally closed long before the June, 1978 solicitation letters, and as to Collins there had never been any communication, written or oral, between these attorneys and him during the Shaffner suit, much less in the five years which had elapsed since then. Directly contrary to the statement in the per curiam opinion that this initiation was "entirely appropriate", the contacts which plaintiffs' attorneys made were in violation of Canons EC-4, DR 2-104(A), and DR 2-103(A).*

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* EC 2-4 and DR 2-104(A) permit only the acceptance of employment from a former client (even if Collins were a former client in any real sense) to whom the lawyer has volunteered "advice that one should obtain the services of a lawyer generally". It does not authorize a lawyer, as was done at bar, to contact a former client and directly and repeatedly solicit employment of himself to bring a specific lawsuit which that lawyer says he wants to assert and on which he has already been working for "three to four months." That goes far beyond merely

After the facts concerning how these actions were begun and maintained were brought to the attention of the Bankruptcy Court which had jurisdiction over the

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(footnote continued)

suggesting to a former client that his rights may have been violated for which he may want to seek the assistance of a lawyer of his choosing; instead it constitutes direct solicitation to employ the particular lawyer writing the letter, to bring a lawsuit which the lawyer has already determined to bring.

That EC 2-4 and DR 2-104 were not intended to authorize such solicitation is made clear by DR 2-103(A), which deals directly with the situation at bar: "A lawyer shall not, except as authorized by DR 2-101(B) [advertising], recommend employment as a private practitioner, of himself, his partner, or associate to a lay person who has not sought his advice concerning the employment of a lawyer." This rule does not make any exception for DR 2-104, as it does for DR 2-101(B), and flatly prohibits the exact kind of solicitation which took place at bar. This point applies a fortiori to the admitted lawyer-initiated contacts with the "purchaser plaintiffs" who are not part of the Shaffner "tender offer" class and were in no way involved in the Shaffner suit.

reorganization of WGI, and before which these same class claims were filed, the Bankruptcy Judge stated in an order that:

> "It is the conclusion of this Court that the so-called class claims and actions by Collins and Shelton-Fulk which are the basis of the alleged claims before the Court are being pursued for the benefit of the attorneys rather than for the benefit of their so-called plaintiffs and clients. . . . Furthermore, it is the conclusion of this Court that the named representative class claimants are not more than 'straw claimants' and these claims are made on behalf of the attorneys, not a valid, certifiable group of class claimants."

Even District Judge Gordon, at the August 21, 1981 class hearing, stated to plaintiffs' attorney, "these folks all say that you rounded up some clients here, and it does look a little bit like it", and that "there is some indication that they [plaintiffs] aren't ["interested in this suit"], that they were forced in here."

The rationale and the result of the decision below is in direct conflict with

the view of a large number of Federal courts that an action which "is the result of an effort to seek out a person willing to have a class action instituted in his name as a representative of a class" cannot be maintained as a class action and "such activity constitutes an abuse of the class action, which courts should not permit." Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 16 F.R.Serv.2d 1021, 1022 (N.D.Tex. 1972); Flamm v. Eberstadt, 72 F.R.D. 187, 190-191 (N.D.Ill. 1976), aff'd. sub nom Susman v. Lincoln American Corp., 561 F.2d 86 (7th Cir. 1977(("class actions have the potential for abuse so as to make them more a vehicle for enrichment of the private bar rather than a tool to prevent unlawful activity. . . . Arrangements such as the one presently before the court can only add support for the critics who wish to see class actions limited.

. . . The court, as a protector under Rule 23(c), can never replace an aggressive and interested plaintiff who seeks vindication of his rights. . . ."); Flanigan v. American Finance System of Georgia, 72 F.R.D. 563 (M.D. Ga. 1976) ("Rule 23 should not be used as a device to enable client solicitation."); Norman v. ARCS Equities Corp., 72 F.R.D. 502, 505 (S.D.N.Y. 1976); Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237, 240 (N.D. Tex. 1972); Smith v. Josten's Am. Yearbook Co., 78 F.R.D. 154 (D.Kan. 1978), aff'd. 624 F.2d 125 (10th Cir. 1980); Stavrides v. Mellon National Bank & Trust Co., 60 F.R.D. 634 (W.D.Pa. 1973); P.D.Q., Inc. of Miami v. Nissan Motor Corp. in U.S.A., 61 F.R.D. 372 (S.D.Fla. 1973); Chevalier v. Baird Sav. Ass'n., 72 F.R.D. 140 (E.D.Pa. 1976); Shields v. First National Bank of Arizona, 16 F.R.Serv.2d 254

(D.Ariz. 1972); Cherner v. Transitron Electronic Corp., 201 F.Supp. 934 (D.Mass. 1962); Rodriguez v. Family Publications Service, Inc., 57 F.R.D. 189, 195 (C.D. Cal. 1972); Buford v. American Finance Co., 333 F.Supp. 1243, 1251 (N.D.Ga. 1971); Baim & Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 108, 111 (S.D. N.Y. 1956).

In a very recent published decision within the Fourth Circuit itself, In re Mid-Atlantic Toyota Antitrust Litigation, 93 F.R.D. 485, (D.Md. 1982), solicitation of class actions was unquestionably assumed to improper:

> "This Court is concerned that putting its imprimatur on this ethical violation will facilitate other ethical violations, such as solicitation. The rationale for rules against solicitation propounded in Ohralik v. Ohio State Bar Ass'n, supra, 436 U.S. at 464, is equally applicable to DR 5-103(B)." (p. 491)

That decision also made this very apt point:

> "The Court does not intimate that there has been or there will be improprieties on the part of counsel in the instant case. However if the possibility exists that the law established in this case might enable some future counsel to engage in such improprieties, the Court cannot condone such actions." (p. 490, n.6).

In Gulf Oil Company v. Bernard, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), the Court's opinion, by Justice Powell, refers to the "opportunity for abuse" presented by class actions, and specifically states that "traditional concerns about 'stirring up' litigation remain relevant in the class-action context." (Note 11.) The same passage goes on to recognize the distinction "between solicitation of clients intended to advance political objectives and solicitation of clients for pecuniary gain." In

that case, which was a racial discrimination suit under the Civil Rights Act, the opinion emphasized, on the solicitation point, that "respondents were represented by lawyers from the NAACP Legal Defense and Education Fund -- a nonprofit organization dedicated to the vindication of the legal rights of blacks and other citizens." On the other hand, the instant case involves "solicitation of clients for pecuniary gain", commonly referred to as "fee-generating cases" by the commentators, rather than "solicitation of clients intended to advance political objectives."

It is now especially imperative for this Court to spell out this critical distinction, and to apply this principle in a concrete situation such as that at bar, especially since a panel of the Fourth Circuit has, in a case of egregious facts, rendered a decision directly

inconsistent with the teachings of Gulf Oil v. Bernard, and the rulings of many other Federal courts.

B. The Total Lack Of Participation And Knowledge On The Part Of The Named Plaintiffs Disqualifies Them As Class Representatives.

As might be expected from the manner in which the suit was originated, the testimony of plaintiffs shows that they did not participate in any of the decisions or furnish any of the underlying facts concerning the lawsuit; did not participate in the preparation of the complaint; did not see the complaint or know the suit had been instituted until well afterwards; did not even see or meet with their own counsel until months after the suit had been started (and that occasion was prompted solely as a result of defendants' noticing plaintiffs for depositions); did not have any knowledge of basic aspects of the claim; and did not

understand, and were not advised by counsel concerning, their duties and functions as a class representative. This point is not based on any contention that plaintiff need have full knowledge of the complexities of the action. It is based on the fact that plaintiffs at bar are so woefully lacking in knowledge, and so blindly reliant on the attorneys who filed the suit in their name, that they fail to meet the minimum standards under even the most lenient test.

Numerous Federal courts have, directly contrary to the ruling below, disqualified class plaintiffs under similar circumstances. As stated in the much quoted case of In re Goldchip Funding, 61 F.R.D. 592, 592-95 (M.D.Pa. 1974):

> "The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives. A proper representative can offer more

> to the prosecution of a class action than mere fulfillment of the procedure requirements of Rule 23. He can, for example, offer his personal knowledge of factual circumstances, and aid in rendering decisions on practical and non-legal problems which arise during the course of litigation. An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved."

Similarly, Levine v. Berg, 79 F.R.D. 95, 97-98 (S.D.N.Y. 1978) held:

> "Plaintiff's deposition testimony reveals . . . a total reliance on her counsel, to whom she 'gave . . . the case and . . . figured whatever he had to do, he did.' . . . In view of plaintiff's lack of personal knowledge of, and unwillingness to learn about, the facts upon which her complaint is based, and the undue emphasis she has placed on her attorney's ability to investigate and prosecute this suit, the mere fact that plaintiff has brought this suit and [unlike the case at bar] is able to bear its costs is of no consequence.

Both of these cases were recently cited with approval by the Eleventh Circuit in

Rothenberg v. Security Management Co., 667 F.2d 958, 926 (11th Cir. 1982), a Rule 23.1 case, in which the Court stated, appropos of the case at bar:

> "In a series of exhaustive depositions, Mrs. Rothenberg acknowledged that the complaint was not filed at her request. She repeatedly testified that she had no personal knowledge concerning a significant portion of the factual basis of the complaint. Any familiarity with the facts or allegations in the complaint that she did have derived largely from conversations with her attorney."

Another oft-cited case, Greenspan v. Brassler, 78 F.R.D. 130, 134 (S.D.N.Y. 1978), held on strikingly similar facts: "Plaintiffs' limited personal knowledge of the facts underlying this suit, as well as their apparently superfluous role in this litigation to date, indicate their inadequacy as class representatives [citing cases]." Weisman v. Darnielle, 25 F.R. Serv.2d 349, 351 (S.D.N.Y. 1978), held pertinently:

> "Plaintiff's superfluous role here does not meet the requirements of Rule 23(a)(4). The class is entitled under that Rule to more than competent counsel. It must also be assured that it will have an adequate representative, one who will check the otherwise unfettered discretion of counsel in prosecuting the suit and who will provide his personal knowledge of the facts underlying the complaint. . . . Plaintiff's evident willingness to rely on counsel's ability to protect the interests of the class is inconsistent with the participation required of an adequate class representative. [Citing cases.]"

In the words of Judge Friendly in Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972), a shareholders' derivative action, ". . . we are not willing to go to the other extreme and accept the view that the attorney for the plaintiff is the dominus litus and the plaintiff only a key to the courthouse door dispensable once entry has been effected".

Accord: Hefland v. Cenco, Inc., 80 F.R.D. 1, 7 (N.D.Ill. 1977) ("none of

these three men can be endorsed as adequate representatives, for it appears that they have abdicated any role in the case beyond that of furnishing their names as plaintiffs."); Tomkin v. Kaysen, 69 F.R.D. 541, 544 (S.D.N.Y. 1976); Moore's Federal Practice, Vol. 3B, p. 23-218.

C. Plaintiffs Have Not Assumed Responsibility For Costs And Expenses.

The class representatives have not undertaken to be responsible for the necessary costs and expenses of the litigation, as required by the rules governing class actions and by Disciplinary Rule 5-103(B). Indeed, each of the parties actually placed a limit on their willingness to defray costs -- which is totally inconsistent with the well-established class action requirements. Each of the class representatives entered into a written agreement with the attorneys

whereby it was agreed that the liability of the clients -- rather than assuming the full cost commitment as required -- would be strictly limited to a small amount per share, totalling only a few thousand dollars for all of the remaining parties, obviously a grossly inadequate amount for litigation of this magnitude, in which litigation costs have already exceeded the small limit by many times, much less an adequate provision for the expenses of discovery and trial on the merits, and probable appeal.

Despite every opportunity, none of the written agreements has been abrogated or amended and nothing has been filed with the court undertaking full and unconditional responsibility for such costs, as required. Moreover, and underscoring the lack of any real financial commitment, none of the so-called class representa-

tives have actually paid a single cent toward the considerable litigation expenses during the entire five-year period (as to which see Esler v. Northrop Corp., 86 F.R.D. 20, 26 (W.D.Mo. 1979)).

Respondents recognized the absence of sufficient funding for these class actions and sought financial assistance from the trustee of WGI (January 16, 1979 Bankruptcy Order), which has been overturned. In re The Washington Group, Inc., 476 F.Supp. 246 (M.D.N.C. 1979), aff'd without op. 636 F.2d 1215 (4th Cir. 1980), cert. denied 451 U.S. 940 (1981). Appellees' counsel admitted, in a number of filings with the court, that financial assistance from the WGI trustee was critical, and that "these two civil actions would certainly not have been brought as class actions without other arrangements for financing the costs", and that "our firm

wouldn't have brought this case or participated in bringing this case but for the promised funding." Due to the Fourth Circuit's affirmance of the prohibition on trustee funding (the panel hearing that appeal being different from the panel below), the funding which respondents represented was critical to the maintenance of these class actions does not now exist. The panel below totally ignored this conclusive point.

Although there has been a lack of uniformity among Federal courts as to the extent to which class plaintiffs must demonstrate financial ability (which was not raised as an issue in the case at bar), the holding below certifying class representatives who have not even assumed responsibility for the costs, conflicts with prior Federal holdings on this point. Strong v. Arkansas Blue Cross & Blue

Shield, Inc., 87 F.R.D. 496, 510 (E.D. Ark. 1980) ably summarized the law applicable in a situation like this:

> "In view of the binding effect on absent class members, courts ought to be especially chary about certifying inadequately resourced plaintiffs as class representatives [citing case]. Plaintiffs must be able adequately (1) to fund discovery and expert testimony, (2) to resist inadequate settlements that plaintiffs in more exigent circumstances would feel compelled to accept, and (3) to fund those notices to class members. . . .
>
> "All of the named plaintiffs in their depositions described the sums which they have available or which they are willing to devote to this lawsuit as 'very limited', 'minimum', or as 'a few hundred dollars.' The claims of nameless others cannot safely be laid on the shoulders of these representatives."

Likewise, Parker v. George Thompson Ford, Inc., 83 F.R.D. 378, 380-381 (N.D.Ga. 1979) held:

> "Plaintiff's counsel has allegedly promised to bear

> responsibility for the costs of this suit, but this can be no more than a guarantee of payment. It is not an adequate substitute for assurance that plaintiff understands her potential obligation of bearing the costs of a class action and is prepared to underwrite these costs. For both of the above reasons, the Court believes that plaintiff has failed to show that she has met the requirement of Fed.R.Civ.P. 23(a)(3) and (4)."

Accord: Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 433-434 (W.D.Mo. 1973), an oft-quoted case ("Seeking to represent a large group of people as a class representative in a lawsuit is a heavy responsibility. It should not be undertaken lightly, and the court should allow such representation only upon a firm foundation that the named plaintiffs are willing and financially able to shoulder that burden. . . . Inadequate financing threatens the procedures and substantive interests of all members of the class."); Ruland v. General Electric Company, 94 F.R.D. 164,

166 (D.Conn. 1982); Apanewicz v. General Motors Corp., 80 F.R.D. 672, 679-680 (E.D.Pa. 1978); Wilson v. General Motors Corp., 21 F.R.Serv.2d 730, 731 (S.D.Ind. 1975).

In McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 560 (5th Cir. 1981), the Fifth Circuit affirmed the denial of class certification because of the absence of "a showing that the plaintiffs can secure proper funding for their litigation."

The decision below directly conflicts with (but does not even so much as mention) a well reasoned decision on this very Rule 23(a)(4) cost issue recently rendered by District Judge Young in the same circuit. In re Mid-Atlantic Toyota Antitrust Litigation, 93 F.R.D. 485 (D.Md. 1982). After carefully reviewing the applicable class cases and professional

canon DR 5-103(B), which prohibits a lawyer from advancing or guaranteeing "the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence" unless "the client remains ultimately liable for such expenses," the court denied certification, stating:

> "Whether the client actually assumed ultimate liability for the expenses is a legal question, not an ethical one. ABA Comm. on Professional Ethics, Informal Opinions, No. 1284 (1973). The Court finds that the agreements are a violation of DR 5-103(B). . . . Indeed, the ABA Committee on Professional Ethics has disapproved of the conduct of plaintiffs' counsel in the instant case:
>
> > '[T]he client must ultimately be responsible for any costs which are advanced, and <u>if he is not willing to agree to this</u>, the lawyer should proceed with the suit as an individual suit or should withdraw. (Emphasis Added) (Discussing class action).'

ABA Comm. on Professional Ethics, Informal Opinion, No. 136 (1975). Accord, ABA Informal Opinion No. 1284, supra.

> "This is because the basic purpose behind Dr 5-103(B) is to prevent the attorney from acquiring a financial interest in the litigation which might interfere with his/her exercise of independent professional judgment, especially when it comes to deciding whether to settle the case. See E.C. 5-1, 5-7, 5-8, ABA Code of Professional Responsibility. Brame v. Ray Bills Finance Corp., supra, 85 F.R.D. 568. If the client is not financially responsible, the attorneys have free rein over the prosecution of the action. This is tantamount to the unacceptable situation of the attorney being a member of the class of litigants while serving as class counsel."

Thus, the decision below runs counter to what has been understood to be the law on class actions, although never specifically discussed by the Supreme Court, that the class representatives must in order to be qualified have committed themselves to bear all of the costs and

expenses of the ligitation. This vital element is totally missing here.

D. Decisions Below Do Not Comply With The Requisite Standards For Review.

Such a compound procedural deficiency in the "accepted and usual" review process arises from what happened in the Court of Appeals and the District Court below "as to call for an exercise of this Court's power of supervision" [Supreme Court Rule 17.1(a)).

In the first instance, the District Court orders do not comply with the requirements for a class order (pp. 10a-28a). As held by the Fourth Circuit itself in the leading case of Shelton v. Pargo, Inc., 582 F.2d 1298, 1312-1313 (4th Cir. 1978), a class action:

> "[T]he court must make specific findings establishing that the case satisfies the several requirements for certification. Professor Miller says in

> this connection that, '[i]f you parse the language of the Rule, you discover that the district judge must make seven affirmative findings before the case can be certified as a class action.'"

Moore's Federal Practice § 23.50 (23-436) states:

> "In determining whether an action brought as a class action is to be so maintained the trial court should carefully apply the criteria, set forth in Rule 23 for the maintenance of a class action, to the facts of the case; and if it fails to do so its determination is subject to reversal by the appellate court when the issue is properly before the latter court." [Emphasis added]"

The September 17, 1982 class order, which adopts verbatim the proposed order submitted by plaintiffs' counsel (except for the addition of the §1292(b) interlocutory appeal language), contains only conclusions as to compliance with each of the criteria, couched in the exact language of Rule 23 itself. By simply changing the caption of the case and the

names of the class representatives, this order would be interchangeable with any other class action in the world, regardless of the facts of the case. It does not deal with the critical issues raised in this case. It does not contain any specific findings of fact to support the court's conclusions.

In a case decided earlier this year by the Fourth Circuit, E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983) quoted from earlier decisions of other circuits:

> "It is established that the requirement of fact findings cannot be met by a 'statement of ultimate fact without the subordinate factual foundations for it which must be the subject of specific findings.' O'Neill v. United States, 411 F.2d 139, 146 (3d Cir. 1969). Further, the fact findings must touch all material issues, 'For the court to exercise adequately its power of review, the district court must make specific findings about the nature and truth of [plain-

> tiffs'] allegations." Borrell v. ICA, 681 F.2d 981 at 992 (D.C.Cir. 1982)." (p. 640, n.3)

The Fourth Circuit went on to say, in words that are equally applicable to class findings as they were to the Rule 52(a) findings there discussed:

> "'[t]he reviewing court deserves the assurance [given by even-handed consideration of the evidence of both parties] that the trial court has come to grips with apparently irreconcilable conflicts in the evidence . . . and has distilled therefrom true facts in the crucible of his conscience.' Golf City, Inc. v. Sporting Goods Co., Inc., 555 F.2d 426, 435 (5th Cir. 1977)." (698 F.2d at 640-1))

The Supreme Court recently emphasized that 'a rigorous analysis" is required to determine whether "the prerequisites of Rule 23(a) have been satisfied"; and that "actual, not presumed, conformance with Rule 23(a) remains, however, indispensible." General Telephone Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740, 752 (1982).

The District Court had on October 26, 1981 granted the motion for class certification, but deferred until later the entry of the class order. The September 17, 1982, order, however, failed to make the required specific and independent findings dealing with the various critical issues raised or the evidence. Instead, it simply adopted verbatim the order prepared by plaintiff's counsel, which was contrary to approved practice:

> "We, along with other courts, have on a number of occasions -- one as recently as a few months ago in Holsey v. Armour & Company, 683 F.2d 864 (4th Cir. 1982) -- expressed our disapproval of a trial court's practice of announcing its decision and then requesting the prevailing party to prepare findings of fact and conclusions of law which the court adopts almost word-for-word in support of its previously announced decision." E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633, 640 (4th Cir. 1983)

Because of the lack of specific findings of fact in the class order and the

District Court's verbatim adoption of an order prepared by counsel, it became doubly essential for the Court of Appeals, lacking the benefit of the District Court's specific findings or independent judgment, to give "close scrutiny" to the District Court determination and to independently examine the "entire record" and specifically deal with the evidence on the critical issues. In violation of its own standards laid down in E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983) (rendered by a panel different from the one below*) and cases

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* As noted in this Petition, there have been several instances of divergence in the application of the law among various panels within the Fourth Circuit. Inconsistency from panel to panel within a single circuit is as much a matter of concern in the administration of justice as a division among the courts in the various circuits. Justice within the Federal system would be seriously miscarried if the outcome of a particular appeal were entirely dependent upon which panel is assigned to the case.

from other circuits cited therein, the brief per curiam opinion gave only the most cursory treatment to the class order and the appeal, and simply rubber-stamped the District Court class order which was itself deficient from a review standpoint.

Finally, its affirmance of the District Court was based on the application of the "clearly erroneous" test (the opinion repeatedly stating that defendants "have failed to show that the district court's findings were clearly erroneous" (pp. 6a-7a)). The "clearly erroneous" criterion was obviously not properly applied in this case, due to the triple deficiency of the absence of specific findings of fact in the class order, the verbatim adoption by the District Court of the order prepared by plaintiffs' counsel, and the failure of the decision of the

Court of Appeals to itself address the significant factual and legal issues raised.

Thus, the careful and adequate review which both the rules of class actions and the rules of judicial review require has never been afforded, and the supervisory intervention of this Court is needed not only to correct a patent error in this case, but also to maintain and reiterate appropriate standards of review generally.

CONCLUSION

As shown above, because (i) the decision below is in direct conflict with the decisions of Federal courts in other circuits, as well as decisions of the Fourth Circuit itself, as to the standards for maintenance of class actions under Rule 23(a); (ii) this Court should settle and implement limits on solicitation of private class actions, as the logical next

step in enforcing and delineating the distinction referred to in Gulf Oil Company v. Bernard, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981); and (iii) the decisions below have so far departed from the accepted and usual course of judicial review, as to call for an exercise of the Court's power of supervision.

Respectfully submitted,

ATTORNEYS FOR PETITIONERS

By
Hubert Humphrey*

James T. Williams, Jr.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD
Post Office Drawer U
Greensboro, N. C. 27402

Attorneys for Smith W. Bagley

*Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1941

Richard A. Gilbert,
Reorganization Trustee;
Webster A. Collins,
Douglas B. Collins,
Herbert R. Morrison,
Helen O. Morrison,
W. O. Gregory,
Dr. Horace H. Hicks,
individually and as
representatives of all
other similarly situated
shareholders of The
Washington Group, Inc.
(formerly The Washington
Mills Company), Appellees,

versus

Smith W. Bagley,
James R. Gilley,
Michael W. Riggsbee,
The Northwestern Bank,
Dewey W. Chappel, Jr.,
American Bank & Trust
of PA., Wheat First
Securities Corporation,
William F. Thomas, A. M.
Pullen & Co., Appellants.

No. 82-1942

George W. Fulk, Chairman of the Pension Profit-Sharing, and Stock Purchase Plan Committees of the Washington Group, Inc.; Ruby Irene Lester, Irene Tomlinson, Thomas W. Shelton, William F. Suddeth, suing on behalf of themselves and all other persons similarly situated, Appellees,

versus

Smith W. Bagley, James R. Gilley, Individually and as Principal Officers and Members of the Board of Directors of the Washington Group, Inc.; American Bank & Trust Co. of PA., a Pennsylvania Corporation, and The Northwestern Bank, a North Carolina corporation, Appellants.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem. Eugene A. Gordon, District Judge.

Argued May 11, 1983
Decided August 24, 1983

Before WINTER, Chief Judge, HALL, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge

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Hubert Humphrey, James T. Williams, Jr. (Brooks, Pierce, McLendon, Humphrey & Leonard; Charles T. Hagan, Jr., Charles T. Hagan, III, Adams, Kleemeier, Hagan, Hannah & Fouts; Russell M. Robinson, II, Fleming, Robinson, Bradshaw & Hinson; Roy G. Hall, Jr., Roy G. Hall, Jr., Esq.; W. Donald Carroll, Jr., Jonathan E. Buchan, Helms, Mulliss & Johnston Clarence W. Walker, Edgar Love, III, Kennedy, Covington, Lobdell & Hickman; Joseph I. Moore, Jr., Moore, Emerson & Niles; John F. Morrow, Morrow & Reavis; Charles E. Nichols, Nichols, Caffrey, Hill, Evans & Murrelle; J. J. Wade, Jr., Wade & Carmichael on brief) for Appellants; Calvin O. Cobb, Jr., Paul J. Ondrasik, Jr. (Henry C. Ikenberry, Howard H. Stahl, Steptoe & Johnson Chartered; Jack E. Canady, Jack E. Thornton, Jr., Blackwell, Blackwell Canady & Eller; Henry A. Mitchell, Jr., Carl N. Patterson, Jr., Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, on brief) for Appellees.

PER CURIAM:

These consolidated interlocutory appeals are from two district court

orders certifying plaintiff classes to assert federal and common law securities fraud claims in actions against two controlling shareholders of the Washington Group, Inc., and numerous related defendants. These actions arose out of a 1973 merger that led to the formation of The Washington Group, Inc., and a subsequent consent decree settling the claims of minority shareholders who alleged fraudulent inducement of their approval of the merger. Shaffner v. Washington Group, Inc., No. C-37-WS73 (M.D.N.C., Jan. 23, 1973). An investigation conducted by the reorganization trustee following the Washington Group's filing for protection under Chapter X uncovered evidence that the company may have withheld relevant information from the settlement proceedings and manipulated the price of its stock to prevent implementation of the

consent decree. In this appeal, defendants challenge the district court's certification decisions on essentially factual grounds, claiming that the named plaintiffs are inadequate class representatives.

With respect to the "purchase plaintiff" class action in Gilbert v. Bagley, No. 82-1941, defendants contend that the attorneys representing the plaintiffs improperly solicited the class representatives. They further argue that the named plaintiffs lack adequate knowledge of the gravaman of the suit and have not participated significantly either in the preparation of the complaint or in tactical deliberations with counsel. Finally, they claim that the class representatives have not made clear their willingness or ability to assume responsibility for the costs of this litigation. While defen-

dants proffer some support for each of these contentions, they have failed to demonstrate that the district court's findings were clearly erroneous.

The record reveals that although plaintiffs' attorneys initiated contact with the proposed class representatives, this does not necessarily constitute solicitation. These attorneys had represented the shareholder class in the Shaffner litigation, which ultimately was settled pursuant to a consent decree in 1973. Once these attorneys became aware that this settlement may have been induced by fraud, initiation of a second suit in behalf of the members of the earlier class was entirely appropriate.

Defendants' assertions that the named plaintiffs lacked substantial knowledge of the legal issues in the case are of little import in cases involving complex legal

and factual issues of securities fraud such as this. It is sufficient that the record supports a finding that the named plaintiffs have such familiarity and interest in this controversy that they will be vigorous in their pursuit of the interests of the class.

Finally, the transcript of the named plaintiffs' deposition testimony clearly supports the district court's finding that the plaintiffs are willing and able to assume responsibility for the costs of this litigation.

Defendants' challenge to the district court's certification of the "tender offer class," Fulk v. Bagley, No. 82-1942, is premised upon similar grounds. Again, however, they have failed to show that the district court's findings were clearly erroneous.

The defendants' contention that the plaintiffs' attorneys "orchestrated" this class suit finds little support in the record. The clear evidence was that George Fulk, the chairman of the Washington Group's pension profit-sharing and stock purchase plan committees, initially contacted counsel to suggest a class suit in behalf of a "tender offer" class. Moreover, he interviewed prospective class representatives, researched their backgrounds, and arranged for them to meet with counsel. Defendants' most damaging claim of wrongdoing in this respect is that plaintiffs' counsel had already drafted a complaint prior to the meeting. But in the absence of any significant evidence that plaintiffs' counsel instigated this meeting or represented that they alone were capable of filing suit in behalf of the class, the defendants'

challenge to the district court's certification decision on this ground is without merit.

Defendants' contentions that the Fulk class representatives failed to participate in the preparation of the case or to demonstrate their willingness or ability to lend vigorous financial support to the litigation also are without merit. The record amply demonstrates that each of the Fulk class representatives have shown a great interest in prosecuting the suit and have invested considerable time in that cause. The record also supports the district court's conclusion that plaintiffs expressed sufficient willingness and ability to assume financial responsibility for this litigation.

The orders of the district court therefore are affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

RICHARD A. GILBERT, ET AL,	)	
Plaintiffs,	)	
v.	)	No. C-78-335-WS
SMITH W. BAGLEY, ET AL	)	
Defendants	)	
GEORGE W. FULK, ET AL	)	
Plaintiffs,	)	
v.	)	No. C-78-333-WS
SMITH W. BAGLEY, ET AL	)	
Defendants	)	

O R D E R

Each of these cases came to be heard on plaintiffs' motions for class certification pursuant to Fed.R.Civ.P. 23. Inasmuch as the issues are the same for each of these cases, the Court consolidates

the cases for the purposes of this motion. In deciding to allow these cases to proceed as class actions, the Court had carefully considered the record, all briefs and the arguments of counsel, and concluded that the requirements of Rule 23 were satisfied. However, proceedings in an action related to the instant cases have been called to the attention of the Court.[1]

---

[1]See letter to this Court dated July 16, 1982, from Hubert Humphrey, Attorney for the Defendant Smith W. Bagley.

As a result, the Court concludes that there are substantial grounds for a difference of opinion within the meaning of 28 U.S.C. § 1292(b) as to whether the requirements of Fed.R.Civ.P. 23(a)(4) are met. Specifically, there is a question as to whether a conflict exists by reason

of the relationship between counsel for the class plaintiffs and the Reorganization Trustee of The Washington Group.[2]

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[2]This relationship is discussed at length in Bankruptcy Judge Reynolds' May 15, 1980, Memorandum Opinion, In the Matter of The Washington Group, et al., Chapter X Reorganization Numbers: B-77-695 through B-77-702. (M.D.N.C. 1980). The possibility of conflict becomes apparent when this Memorandum is read in conjunction with the July 20, 1982, Memorandum Opinion entered in the same case.

Now, therefore, the Court finds with regard to the Gilbert case:

1. This action may be maintained as a class action on behalf of the class composed of all persons who exchanged their rights of action in Emil N. Shaffner, et al. v. Washington Group, Inc., et al., Civil Action No. C-37-WS-73 (M.D. N.C. filed January 23, 1973), for the rights granted and promises made under the July 12, 1973, "Agreement of Settlement"

therein, and in so doing suffered a loss; and all persons who purchased or contracted to purchase securities of The Washington Group, Inc., formerly Washington Mills Company, between November 4, 1972, and June 20, 1977, inclusive, and who subsequently sold, transferred or retained such securities or contracts at a loss. Excluded from the class are all the defendants herein (except any defendant who is determined not to be culpable) as well as any other person (including any officer, director, employee, partner or agent of any of the defendants) who aided and abetted, participated with or conspired with any said defendant in any of the defendants' alleged wrongful actions or omissions to act, with knowledge of such wrongful actions or omissions to act.

2. The class as here defined is so numerous that joinder of all members is impracticable.

3. There are questions of law or fact common to the class.

4. The claims of the plaintiffs Webster A. Collins, Herbert R. Morrison, Helen O. Morrison and Glen A. Wilkinson are typical of the claims of the class.

5. Webster A. Collins, Herbert R. Morrison, Helen O. Morrison and Glen A. Wilkinson have no interests antagonistic to others of the class and these plaintiffs and their counsel will fairly, competently and adequately protect the interests of the class.

Pursuant to subparagraph (b)(3) of Rule 23, the Court further finds:

6. The questions of law or fact common to the members of the class predominate over questions affecting only individual members.

7. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In conclusion, and in all fairness to the defendants, it must be noted that this is an extremely complex case involving a myriad of facts. Defendants have put forth controlling legal questions to which a difference of opinion exists. Should the law be otherwise than as determined by the Court, much time and effort will be spared by an immediate appeal from this Order.

Based on these findings, IT IS ORDERED:

1. That this action is a proper class action and may be so maintained pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

2. That Webster A. Collins, Herbert R. Morrison, Helen O. Morrison and Glen A. Wilkinson are designated pursuant to Rule 23(a) as representatives of the above-defined class.

3. That this Order is conditional, and may be altered or amended at any time prior to the decision on the merits.

4. That counsel for the class representative plaintiffs shall submit to this Court a proposed form of notice to the class members within thirty days of the entry of this Order.

5. That this case is certified for immediate appeal pursuant to the provisions of 28 U.S.C. § 1292(b).

With regard to the Fulk case, the Court finds:

1. This action may be maintained as a class action on behalf of the class of persons composed of all participants in

or beneficiaries of any employee benefit plan sponsored or maintained by the Washington Group, Inc., or any of its subsidiaries or affiliates (including predecessor companies thereto), including but not limited to The Washington Group, Inc. Profit-Sharing Retirement Plan for Salaried Employees, The Washington Group, Inc. Profit-Sharing Retirement Plan for Nonsalaried Employees, the Johnston Mills Company Profit-Sharing Plan, the Pension Plan of the Washington Group, Inc. and/or the Employee Stock Purchase-Savings Plan for the Washington Group, Inc., and including any predecessor plans thereto.

2. The class as here defined is so numerous that joinder of all members is impracticable.

3. There are questions of law or fact common to the class.

4. The claims of plaintiffs Thomas W. Shelton, William F. Suddeth, Ruby Irene Lester and Irene Tomlinson are typical of the claims of the class.

5. Plaintiffs Thomas W. Shelton, William F. Suddeth, Ruby Irene Lester and Irene Tomlinson have no interest antagonistic to those of the class and these plaintiffs and their counsel will fairly, competently and adequately protect the interests of the class.

Pursuant to subparagraph (b)(1) of Rule 23, the Court further finds:

6. The prosecution of separate actions by or against individual members of the class would create a risk of:

A. Inconsistent or varying adjudications with respect to individual members of the

class which would establish incompatible standards of conduct for the parties opposing the class; and

B. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

In conclusion it must be noted that the defendants have put forward controlling legal questions to which substantial grounds for a difference of opinion exists. Should the controlling law be otherwise than as this Court has found, there is no doubt but that time and

effort will be spared by an immediate appeal from this Order.

Based on the findings set forth above, IT IS ORDERED:

1. That this action is a proper class action and may be so maintained pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure.

2. That plaintiffs Thomas W. Shelton, William F. Suddeth, Ruby Irene Lester and Irene Tomlinson are designated pursuant to Rule 23(a) as representatives of the above-defined class.

3. That this Order is conditional, and may be altered or amended at any time prior to the decision on the merits.

4. That this case is certified for immediate appeal under the provisions of 28 U.S.C. § 1292(b).

/s/ Eugene A. Gordon
United States District Judge

September 17, 1982

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

RICHARD A. GILBERT, et al,	)
Plaintiffs,	)
v.	) No. C-78-335-WS
SMITH W. BAGLEY, et al,	)
Defendants	)

MEMORANDUM AND ORDER

GORDON, Chief Judge

I. CLASS ACTION CERTIFICATION

Defendants' objections to certification of this action as a class action are directed partly to the facts surrounding the inception of this suit and partly to the adequacy of class representation by the named plaintiffs.

Defendants would have the Court deny class certification on account of what defendants contend is an abuse of the

class action process on the part of the plaintiffs' attorneys. The Court is not convinced that there was any violation of the canons of ethics, especially one or more violations justifying denial of class certification. However, there are other avenues where this matter can be pursued and all concerned can be heard.

Questions as to the ability of the named plaintiffs adequately to represent the classes have been raised. These questions are based upon the argument that a judgment resulting from this action would be subject to collateral attack on the part of the absent class members in the event their interests are not adequately protected in this action.

In particular, financial ability of the named plaintiffs to maintain this action and ability to vigorously represent the class have been questioned. The Court

is of the opinion that the funds of the Shareholders' Protective Committee are sufficient to cover the costs. It is concluded that the certification should not now be denied for lack of funds. See Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974), cert. denied 95 S. Ct. 1573.

Further, the Court concludes that the named plaintiffs in this suit can adequately represent absent class members. The named plaintiffs have retained competent attorneys. The plaintiffs appear to have no interests antagonistic to others of the class. See Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239, 247 (3rd Cir.), cert. denied 421 U.S. 1011 (1975).

It is concluded that it is appropriate to certify this action, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, as a class action.

II. MOTION TO DISMISS AMENDED COUNTS VI AND VII OF THE AMENDED COMPLAINT

These counts were dismissed because, as originally pleaded, the counts did not allege that The Washington Group failed to perform its obligation under the Shaffner settlement agreement. Gilbert v. Bagley, 492 F.Supp. 714, 736 (1980). Amended Counts VI and VII correct this omission. The defendants' motion to dismiss Amended Counts VI and VII for failure to state a cause of action should be denied.

III. TRUSTEE'S MOTION TO SEVER

The Court is of the opinion at this time that no substantial conservation of the Court's resources would result nor would prejudice, if any, to parties be prevented by severance of Trustee's claims. The Trustee's motion to sever will be denied without prejudice to a

renewal of said motion at the close of discovery.

IV. DISCOVERY MOTIONS NOW PENDING

Counsel will be notified in the near future of the date and time of an initial pretrial conference. At the pretrial conference, a schedule for discovery will be set and limits on discovery considered, resolving issues raised by pending discovery motions.

V. MOTIONS TO DISMISS GLEN WILKINSON'S COMPLAINT IN INTERVENTION

Having considered fully defendants' motions, briefs of counsel and the entire official record, the Court is of the opinion that the motions should be denied.

VI. MOTION FOR CLASS DISCOVERY AS TO GLEN WILKINSON

Having considered fully the motion

and the arguments of counsel, the Court concludes that defendants' motion for class discovery as to Glen Wilkinson should be denied.

VII. MOTIONS TO WITHDRAW BY PLAINTIFFS GREGORY, HICKS; MOTIONS FOR SANCTIONS

Having considered fully the motions, briefs, and affidavits in support of the motions, the Court concludes that the motions for withdrawal should be allowed. The Court reserves judgment on the motion for sanctions.

For the reasons hereinbefore stated, it is ADJUDGED AND ORDERED as follows:

1. The motion to certify the class is GRANTED and this action is certified, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, to be a class action.

2. The motions to dismiss amended Counts VI and VII of the Amended Complaint are DENIED.

3. The motion to sever the Trustee's claims is DENIED without prejudice to a renewal of said motion at the close of discovery.

4. A schedule of discovery will be set at the initial pretrial conference.

5. The motions to dismiss Glen Wilkinson's Complaint in Intervention are DENIED.

6. The motion for class discovery as to Glen Wilkinson is DENIED.

7. The motions to withdraw by plaintiffs Gregory and Hicks are GRANTED. The Court reserves judgment on the motions for sanctions.

Further, it is ORDERED that attorneys for the plaintiffs present to the Court on

or before November 6, 1981, a proposed Order certifying this action as a class action under the provisions of Rule 23(b)(3), which Order shall define the class or classes and provide that the Order is conditional and may be amended or altered. Copies of the proposed Order will, of course, be forwarded to all counsel of record for the defendants at the time the proposal is submitted to the Court. Any comment by counsel for defendants must be submitted by November 13, 1981.

/s/ Eugene A. Gordon
United States District Judge

October 26, 1981

JUDGMENT

United States Court of Appeals
for the
Fourth Circuit

No. 82-1941

Richard A. Gilbert,
Reorganization Trustee;
Webster A. Collins, Douglas
B. Collins, Herbert R. Morrison,
Helen O. Morrison, W. O. Gregory,
Dr. Horace H. Hicks, individually
and as representatives of all
other similarly situated share-
holders of the Washington Group,
Inc., (formerly The Washington
Mills Company),

Appellees,

v.

Smith W. Bagley, James R.
Gilley, Michael W. Riggsbee,
The Northwestern Bank, Dewey
W. Chapple, Jr., American
Bank & Trust of PA., Wheat
First Securities Corporation,
William F. Thomas, A. M. Pullen
& Co.,

Appellants.

Appeal from the United States District Court for the Middle District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate II
CLERK

Filed
August 24, 1983

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1941

Richard A. Gilbert, Reorganization Trustee; Webster A. Collins, Douglas B. Collins, Herbert R. Morrison, Helen O. Morrison, W. O. Gregory, Dr. Horace H. Hicks, individually and as representatives of all other similarly situated shareholders of The Washington Group, Inc. (formerly The Washington Mills Company), Appellees,

versus

Smith W. Bagley, James R. Gilley, Michael W. Riggsbee, The Northwestern Bank, Dewey W. Chappell, Jr., American Bank & Trust of PA., Wheat First Securities Corporation, William F. Thomas, A. M. Pullen & Co., Appellants.

No. 82-1942

George W. Fulk, Chairman of the Pension Profit-Sharing, and Stock Purchase Plan Committees of the Washington Group, Inc.; Ruby Irene Lester, Irene Tomlinson, Thomas W. Shelton, William F. Suddeth, suing on behalf of themselves and all other persons similarly situated, Appellees,

versus

Smith W. Bagley, James R. Gilley, Individually and Principal Officers and Members of the Board of Directors of the Washington Group, Inc.; American Bank & Trust Co. of PA., a Pennsylvania Corporation, and The Northwestern Bank, a North Carolina corporation, Appellants.

FILED
September 28, 1983

O R D E R

Upon consideration of the petition for rehearing, and with no judge in

regular active service requesting a poll of the court on the suggestion of rehearing en banc, and with the concurrence of Chief Judge Winter and Judge Hall,

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

/s/ CLEMENT F. HAYNSWORTH, JR.
CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge